SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

Civil Action No. 681

SOUTHERN RAILWAY COMPANY, A CORPORATION,
Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, AS ITS PRESIDENT, and JIMMY HITCHCOCK and C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, and A. A. CARMICHAEL, ATTORNEY GENERAL OF THE STATE OF ALABAMA,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Middle District of Alabama, Northern Division, is not reported. A copy of the opinion, findings of fact, conclusions of judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on July 20, 1950. A petition for appeal is presented to the District Court herewith, to-wit, on September 18th, 1950. The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United States Code, and, as provided in Section 1253, Title 28, United States Code, a direct appeal to the Supreme Court of the United States may be taken from the final decree made by such specially consfituted District Court. It is further provided by Title 28, Section 2101 (b) that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

Questions Presented

Where state statutes provide that a railway may not abandon service unless it first obtains a certificate from the State Public Service Commission allowing such abandonment, and after hearing and consideration the Commission declines to grant such cer ificate and the railway files a complaint asking an injunction of a three-judge Federal Court:

a. Does a three-judge Federal Court have jurisdiction of such suit if the railway has made no attack on the constitutionality of the statutes which require that the trains continue operation, but only on the constitutionality of the order which denied the certificate to abandon?

b. Does a three-judge Federal Court have jurisdiction of such suit if only the constitutionality of the order is attacked, but relief sought is an injunction enjoining the Public Service Commission and other state officers from enforcing any penalties or remedies provided under state law, which penalties or remedies are not called for by the order or authorized by it?

c. Assuming *arguendo* that there is jurisdiction for a three-judge federal court, should the court abstain from exercising it to enjoin enforcement of state criminal laws where there has been no threat of imminent enforcement of criminal sanctions, no allegation of possible multiplicity of suits, and where any criminal penalties which might be assessed would be only a consequence of violation of the state law?

d. Assuming *arguendo* that there is a jurisdiction for a three-judge federal court, should the court abstain from exercising its jurisdiction in recognition of the wisdom of allowing state courts to try questions of local state policy relating to complicated questions of fact?

Statutes Involved

Code of Alabama 1940, Title 48, Sections 35, 50, 76, 78, 79, 81, 82, 84, 106, 399 and 400; United States Code, Title 28, Sections 1253, 2101 (b), 2281, 2284. The said statutes are set out verbatim or pertinent parts thereof are appropriately summarized in Appendix B hereto.

Statement

Appellee, hereinafter referred to as Southern, has operated trains between Sheffield-Tuscumbia, Alabama and Chattanooga, Tennessee, as a part of its railroad system. In September 1948 Southern petitioned the Alabama Public Service Commission to allow it to abandon the operation of passenger trains 7 and 8 between the above cities, pursuant to the requirements of Code of Alabama 1940, Title 48, Sections 35 and 106, which require that no transportation company shall abandon any of its service to the public unless it first shall have filed an application for permit to abandon service and obtained from the Commission a permit allowing such abandonment. After two continuances, a hearing was had on October 6, 1949, and on April 3, 1950, the Commission entered an order denying Southern's application for authority to abandon.

Southern did not ask for a re-hearing under Code of Alabama 1940, Title 48, Section 76, nor did it take an ap-

peal from the Commission's order, even though Code of Alabama 1940, Title 48, Section 79 provides for an appeal from any final action or order of the Public Service Commission to the Circuit Court of Montgomery County, Alabama, in Equity, and thence to the Supreme Court of Alabama. Sections 81 and 84 of Title 48 provide that on any such appeal the order or action appealed from may be stayed or superseded by the State Appellate Court, or the Judge thereof, upon hearing after consideration of the testimony taken before the Commission, and except in rate cases not here involved, such supersedeas may be ordered by the said Court or Judge without the requirement of a supersedeas bond. Section 82 of Title 48 provides that the Appellate Court shall hear the case upon the certified record and shall set aside the order of the commission if the Court finds that the Commission erred to the prejudice of appellant's substantial rights in its application of the law, or that the order was based upon a finding of facts contrary to the substantial weight of the evidence.

Instead Southern filed its complaint in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged federal questions involved, and upon diversity of citizenship, and asked for convocation of a district court of three judges and a hearing under the provisions of U. S. Code, Title 28, Section 2284. Southern alleged that the revenue received from operation of trains 7 and 8 was disproportionate to expenses and that the continuation of such trains was not required by public convenience and necessity. There were allegations that the Commission's order deprived Southern of its property without due process, that it was being denied equal protection of the law, that interstate commerce was being burdened and that the order was unjust and confiscatory. It was also averred that Southern had exhausted all administrative remedies available to it.

Paragraph IV of the complaint contained a purely colorable attack on the constitutionality of Code of Alabama 1940, Title 48, Sections 35 and 106, the railroad frankly stating that it was making such allegations for the purpose, and only for the purpose, of avoiding an admission of record that the statutes were unconstitutional and also stating "The plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama." At the trial, as in the pleadings, Southern's only real attack on constitutional grounds was directed at the Commission's order of April 3, 1950.

Appellants first filed with Hon. Charles B. Kennamer, Judge of the United States District Court for the Middle District of Alabama, a petition directed to him individually, asking that he stay the call for a three-judge federal court. No formal order was issued by Judge Kennamer, but this motion was ruled upon by the three-judge Court after it convened, along with other motions. Thereafter appellants filed a motion to dismiss, a motion to stay and an answer. After oral argument on May 22, 1950, all of appellants' motions were overruled and it was then stipulated by counsel for the parties that evidence should be taken and the case submitted on Southern's prayer for a permanent injunction. Thereafter, on July 20, 1950, the Court issued its final judgment and decree overruling all of appellants' motions, declaring the Commission's order of April 3, 1950 to be null and void, and enjoining the appellants, their successors in office and their agents, servants and attorneys from taking any steps or proceedings of any nature whatsoever against the Southern to enforce the order of April 3, 1950, or to enforce any fine, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against the plaintiff, its officers, agents or

employees on account of the failure to observe the provisions and requirements of the order by abandoning and discontinuing the operation of plaintiff's passenger trains Nos. 7 and 8 from Tuscumbia, Alabama to Chattanooga, Tennessee, so far as they are operated in the State of Alabama.

The Questions Are Substantial

The questions involved in this appeal are similar to those raised in several recent cases before this Court, among them being:

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643 (1941);

Burford v. *Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943)

Beal et al. v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418 (1941)

Ex parte Bransford, 310 U.S. 354, 60 S. Ct. 947 (1940)

There are involved the same fundamental issues of how far the federal judiciary has jurisdiction over local questions which can be adjudicated by state courts, and to what extent federal courts should exercise jurisdiction which they do have over such questions where there is ample provision for judicial determination within the framework of state courts. The decision of the three-judge District Court in finding that it had jurisdiction is in direct conflict with the language of the statute under which it was convened, and even had there been jurisdiction the decision is contrary to the clear policy set out in numerous recent decisions of the Supreme Court that federal courts will stay their hand on local matters until the state courts have ruled.

. . . . . .

I. As appellants read Tit. 28, U.S.C. Sect. 2281, three requirements must be met before there is jurisdiction for a special three-judge federal court.

a. An interlocutory or permanent injunction must be sought.

b. The injunction must be sought on the ground that a state statute is unconstitutional (*Oklahoma Natural Gas Co.* v. *Russell*, 281 U.S. 290, 43 S. Ct. 353 (1923) interprets "statute" as including "order".)

c. The injunction must seek restraint of enforcement, operation or execution of the statute or order whose constitutionality is attacked. Appellants submit that there can be real question of this in view of the specific language of the statute:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute (including "order", since the *Oklahoma* case) . . . shall not be granted . . . upon the ground of the unconstitutionality of *such* statute (including "order" since the *Oklahoma* case)."

Southern's complaint failed to meet requirements "b" and "c" as to any Alabama statute. The attack on the constitutionality of Tit. 48, Secs. 35 and 106 is colorable and in fact Southern frankly stated it did not ask for an adjudication of constitutionality of the statutes because "that is a matter primarily for the Supreme Court of Alabama." The prayer for relief includes statutes in the requested cloak of protection, for it refers to "any penalties or other remedies provided under the laws of the State of Alabama," but the statutes included neither are identified nor is their constitutionality attacked.

As to the Commission's order of April 3, 1950, it is squarely charged to be unconstitutional, but the complaint did not ask relief in terms of the order but went far beyond that and sought an injunction against all possible

penalties and remedies under Alabama law, a much broader field of relief than the language of Section 2281 allows—injunction against "enforcement, operation or execution" of "such statute or such order". Southern's prayer and the Court's decree would include even common law remedies, which is a broad extension of Sec. 2281. And the Alabama Supreme Court has held that orders of the Commission may be enforced by the courts by issuance of writs of mandamus.

Alabama Public Service Commission v. *Western Union Telegraph Co.*, 208 Ala. 243, 94 So. 472 (1922).

Southern has sought to create a new field for federal jurisdiction by using allegations of unconstitutionality of an order as a springboard to get into court while seeking relief from a constitutional statute, and from any and all forms of redress to which it might be subject whenever it wishes to violate the laws of the State.

The theory of the District Court seemed to be that it could enjoin whatever penalties and remedies, statutory or common law, as it saw fit in order to give effective relief as a duly convened court of equity. But this is "bootstrap law", since jurisdiction is conferred initially only if relief is sought from the statute (or order) whose constitutionality is questioned. The three-judge court cannot, by the broad scope of its relief confer jurisdiction upon itself retrospectively, if the complaint averred no case quickening the special jurisdiction of the statutory created court. The three-judge court is of statutory creation and its jurisdiction is to be strictly limited by the statute which created it, and is not to be lightly extended.

Okla. Gas & Elec. Co. v. *Okla. Packing Co.*, 292 U. S. 386, 54 S. Ct. 732 (1934);

Phillips v. *U. S.*, 312 U. S. 246, 61 S. Ct. 480 (1941).

Too, it is noteworthy that the extraordinary relief obtained, going far beyond the relief against "such statute" (N.B., or "order") authorized by Sec. 2281, is exactly the relief prayed for by the Southern from the very beginning, and the complaint was challenged by appellants on jurisdictional grounds before the three judges ever convened (by motion directed to Judge Charles B. Kennamer individually) and challenged again after the three-judge court convened but before any evidence was taken and before the Court ruled that it had jurisdiction to proceed. This is no special case of equity giving extraordinary relief where it cannot give that asked but of equity giving the relief prayed for.

The "negative order" doctrine of *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 51 S. Ct. 429 (1931) and *Piedmont & Northern Ry.* v. *U. S.*, 280 U. S. 469, 50 S. Ct. 192 (1930), has been carved away somewhat, though to what extent is not clear.

See: *U. S.* v. *I. C. C.*, 337 U. S. 426, 69 S. Ct. 1410 (1949);
But cf.: *Ashland Coal & Ice Co.* v. *U. S.*, 325 U. S. 840, 65 S. Ct. 1573 (1945).

More than a negative order is involved here where the attack on the order is the nominal basis for three-judge jurisdiction on constitutional grounds, with relief being sought from a statute whose constitutionality is admittedly a matter for state court decision.

The District Court has also overlooked *Ex parte Bransford*, 310 U. S. 354, 60 S. Ct. 947 (1940), where a distinction is made between the ground of unconstitutionality of a statute as applied, which requires a three-judge Court, and the ground of the unconstitutionality of the result obtained by use of a statute which is not attacked as unconstitutional. Southern has done no more than attack as unconstitutional the result of an administrative act, and has not attacked the statute as generally applied to petitions

for discontinuance. This case also holds that a three-judge court is not required unless the action complained of is directly attributable to the statute (or an order, *a fortiori*). Here the penalties and remedies as to which relief is sought are not called for by the order or authorized by it, but in truth and in fact are directly attributable only to the statute.

The decision of the District Court is in conflict with the holding in *Wilentz et al.* v. *Sovereign Camp*, 306 U. S. 573, 59 S. Ct. 709 (1939) wherein it is held that an injunction in a three-judge case must be directed at state officers who are clothed with authority to enforce the challenged statute and have taken steps to enforce such statute. In view of *Oklahoma Natural Gas Company, supra*, this would apply to the Commission's order, but no state official has taken any steps to enforce the order, which in fact calls for no enforcement.

* * * * * * *

II. The decision below is in conflict with *Beal et al.* v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418, (1941), which case indicates that if only a single suit is contemplated for penalties, the Supreme Court could not say that any such irreparable injury is threatened as would justify staying prosecution of the criminal laws of the State and withdrawing the determination of the legal question involved from the state courts whose appointed function it is to decide it. In the present case Southern has not alleged any possible multiplicity of suits nor has it adduced any evidence to that effect. In fact there has been no move on the part of any state officer to enforce the statute at all. The case also notes that even if an adverse decision were rendered in the state court causing large penalties to be

assessed against the railroad, such penalties might well be the consequence of violation of state law.

* * * * * * *

III. The decision below is contrary to numerous recent holdings of the Supreme Court concerning the desirability of federal courts abstaining from exercising their jurisdiction on matters which are properly decided first by the courts of the state.

Shipman v. *Dupre*, 339 U. S. 323 (1950);
Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643 (1941);
Burford v. *Sun Oil Co.*, 319 U. S. 315, 63 S. Ct. 1098 (1943);
Chicago v. *Fieldcrest Dairies*, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. *Watson*, 327 U. S. 582, 66 S. Ct. 761 (1946);
Township of Hillsboro v. *Cromwell*, 326 U. S. 620, 66 S. Ct. 445 (1945);
Stainback v. *Mo Hock Ke Lok*, 336 U. S. 368, 69 S. Ct. 606 (1949).

The same thread runs through all of the above cases, that to avoid needless friction with state policies the federal judiciary should exercise a wise discretion giving due regard to the rightful independence of the state government and the smooth working of the federal judiciary. Is this not especially so where the railway is in truth seeking to escape the impact of statutes the constitutionality of which it admits is properly for consideration by the Supreme Court of the State, for as was pointed out by Mr. Justice Frankfurter in the *Pullman* case, *supra*, a decision by the State courts may avoid the necessity of a constitutional decision in the federal courts, and a ruling by a federal court

may prove to be supplanted by a subsequent controlling decision of a state tribunal.

The District Court declined to abstain from exercise of jurisdiction on the ground that there were no questions of novel, ambiguous or undecided state law involved. But *Burford* v. *Sun Oil Co., supra,* indicates that there is no such limitation, so long as there are "basic problems of state policy" involved, that problems of local law are to be left to local courts where each case may be handled as "one more item" in a continuous series of adjudgments. That this case is vital for the Alabama Public Service Commission and Alabama courts is made clear by the fact that this is the second in a series of such cases by Southern filed in the same judicial district, a third by another railroad has already been submitted to the same Court (*Atlantic Coast Line R. R. Co.* v. *Ala. Public Service Commission, et als.,* filed August 2, 1950, and the parties hereto well know that cases already are being readied by other railroads who, like Southern, are trying to escape the process of adjustment of a complex situation through local courts and make of the three-judge courts a tribunal for appeal of administrative orders.

Respectfully submitted,

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Filed Sept. 18, 1950. O. D. Street, Jr., Clerk, by Annie Schoolar, Deputy Clerk.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 681

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, Its President, and JIMMY HITCHCOCK and C. C. (JACK) OWEN, Associate Commissioners; and A. A. CARMICHAEL, Attorney General of the State of Alabama, *Defendants*

Before McCord, Circuit Judge, Kennamer and Lynne, District Judges

LYNNE, *District Judge:*

Resting the jurisdiction of the district court upon the Federal question and amount in controversy provisions of Title 28, Section 1331, U. S. C. A., or upon the diversity of citizenship and amount in controversy provisions of Title 28, Section 1332, U. S. C. A., and that of a district court of three judges upon the provisions of Title 28, Section 2281, U. S. C. A., plaintiff, a Virginia corporation, complained of the Alabama defendants and prayed for both temporary and permanent injunctive relief against them.

Plaintiff's basic insistence is that the revenue derived from the operation of its passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, is grossly disproportionate to the direct expenses and that the continuation of such train service is not demanded or required by the public necessities.

Alleging the exhaustion of administrative remedies, plaintiff exhibits its petition for a permit allowing abandonment of such service, filed with defendant, Alabama Public Service Commission, September 13, 1948, pursuant to the

requirements of Title 48, Sections 35 and 106, Code of Alabama, 1940. There follow averments calculated to show undue delay in the hearing and consideration of the petition culminating in an adverse order entered by defendant Commission on April 3, 1950.

Emphasizing the impact of the Commission's order within the framework of the statutory scheme of regulating transportation companies, Title 48, Code of Alabama, 1940, plaintiff makes clear that it is impaled on the horns of a dilemma. If it continues the operation of such trains, it will lose substantial sums of money. If it ignores the Commission's order and abandons such services, it will face the imposition of severe sanctions under pertinent statutes. Either course, it complains, will result in irreparable damage unless this court grants injunctive relief.

Following the constitution of a three-judge district court in conformity with the provisions of Title 28, Section 2281, U. S. C. A., this action was, on May 8, 1950, set down for a hearing on plaintiff's prayer for a temporary injunction at Montgomery, Alabama, on May 22, 1950.

Upon its convocation, this court was met at the threshold with three several motions, in which all defendants joined, raising certain adjective problems relating to the jurisdiction of the court, the propriety of exercising such jurisdiction as it might be found to have, and the right of plaintiff to injunctive relief in any event.

At the conclusion of oral arguments, the court, after consultation announced its opinion that each of such motions was due to be overruled for reasons thereafter to be stated. Whereupon, it was stipulated by counsel for the parties that evidence should be adduced and the case submitted upon plaintiff's prayer for a permanent injunction.

I. Adopting a literal construction of the following language of Title 28, Section 2281, U. S. C. A.:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall

not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

defendants challenge the jurisdiction of this District Court of three judges because no attack is leveled at the constitutionality of the State statutes under which the defendant Commission acted. Since, it is argued, plaintiff does not seek an adjudication of unconstitutionality of such statutes but relies squarely upon the assertion that the order of the defendant Commission denying plaintiff the right to abandon the passenger train service concerned is confiscatory in effect and therefore violative of the Fourteenth Amendment to the Constitution of the United States, the quoted statute is manifestly inapplicable.

Dispositive of this contention is *Oklahoma Natural Gas Co.* v. *Russell* 261, U. S. 290, 43 S. Ct. 353, 67 L. E. 659 (1923), in which Mr. Justice Holmes, delivering the opinion for a unanimous court, stated:

"A doubt has been suggested whether these cases are within Sec. 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforceemnt or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such States' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is contrued with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed

repeatedly that the section was to be taken more broadly. Louisville & Nashville RR. Co. v. Finn, 235 U. S. 601, 604. Phoenix Ry. Co. v. Geary, 239 U. S. 277, 280, 281. Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U. S. 212. Western & Atlantic R. R. v. Railroad Commission of Georgia, ante, 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 301, 318. Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 555. Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana, 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest."

We hold that a Federal three-judge district court has jurisdiction to entertain a complaint alleging the unconstitutionality of an order of an administrative board or commission, acting under a State statute and praying for injunctive relief against the enforcement, operation or execution of such order, although no attack is made upon the validity of the statute itself.[1]

II. Insisting that this court should herein decline to exercise its jurisdiction, defendants first invoke the familiar doctrine of exhaustion of administrative remedies. Pointing to the provisions of Title 48, Section 79, et seq., Code of Alabama, 1940, defendants assert that the appellate procedure therein provided is a part of the administrative process.

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[1] *Herkness* v. *Irion. Comm. of Conservation, et al.*, 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198 (1928);

Ex Parte Williams Tax Comm., 277 U. S. 267, 48 S. Ct. 523, 72 L. Ed. 877 (1928);

Prendergast, et al. v. *New York Telephone Co.*, 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923);

Louisville & N. R. Co. v. *Railroad Comm. of Ala.*, 208 Fed. 35 (D. C. Ala. 1913).

We do not agree. In *Avery Freight Lines, Inc.* v. *Persons*, 250 Ala. 40, 32 So. 2d 886 (1947), the Supreme Court of Alabama, in holding that an appeal to the Circuit Court under the statutes concerned was judicial and not legislative or administrative, observed:

> "Under the foregoing statutes • • • the circuit court can do only three things. (1) It can affirm the order of the Public Service Commission. (2) It can set aside the order of the Public Service Commission. (3) It can remand the case to the Public Service Commission for further proceedings in conformity with the direction of the court. The legislature evidently did not intend 'that the reviewing court should put itself in the place of the commission, try the matter anew as an administrative body, weigh the evidence and substitute its finding and judgment on the merits as that of the commission.' State v. Public Service Commission, 234 Mo. App. 470, 134 S. W. 2d 1069, 1076; Id., 348 Mo. 613, 154 S. W. 2d 777; 51 C. J. p. 758. See Alabama Public Service Commission v. Crow, 247 Ala. 120, 22 So. 2d 721."

After discussing a similar statutory design for judical review of administrative orders in *Bacon, et al. Public Service Comm. of State of Vermont* v. *Rutland Railroad Co.*, 232 U. S. 134, 138, 34 S. Ct. 283, 58 L. Ed. 538 (1914), the court said:

> "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not, if exceptions are taken (which does not appear in this case), is immaterial; the remedy in any event is purely judicial; to exonerate the appellant from an order that exceeds the law. This, we understand, is the view taken by the Supreme Court of the State, Bacon v. Boston & Maine R. R., 83 Vermont, 421, 457; Sabre v. Rutland R. R. Co., 86 Vermont,

347, 368, 369, and this being so, by the rule laid down in Prentis v. Atlantic Coast Line Co., the railroad company was free to assert its rights in the District Court of the United States."

We hold that defendant Commission's order denying plaintiff's petition terminated the administrative process, entitling plaintiff to resort immediately to this court for relief.[2] The failure of plaintiff to apply for a rehearing does not affect the result. Title 48, Section 76, Code of Alabama, 1940, permits an application for a rehearing before the Commission but does not require it. No Alabama case has been called to our attention, we have found none, holding that such an application must have been made before resorting to the statutory procedure for appeals to the State courts, to which we have referred. Moreover, in the absence of a statutory requirement making application for a rehearing a condition precedent to the right of judicial review, plaintiff was authorized to proceed in this court without first having availed itself of such a privilege.[3]

There is no merit in defendants' insistence that plaintiff must perforce litigate the validity of the alleged confiscatory order in the State courts. Jurisdiction of this court has been invoked by facts properly pleaded. Plaintiff had a choice of forums. It could have prosecuted an appeal to the Circuit Court of Montgomery, Alabama (Title 48, Section 79, Code of Alabama, 1940) or it could have invoked

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[2] *St. Louis-San Francisco Railway Co.* v. *Ala. Public Service Comm.*, 279 U. S. 560, 49 S. Ct. 383, 73 L. Ed. 843 (1929);

Prendergast, et al. v. *New York Telephone Co.*, 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923);

Bacon, et al. Public Service Comm. of State of Vermont v. *Rutland Railroad Co.*, 232 U. S. 134, 34 S. Ct. 283, 58 L. Ed. 538 (1914);

Chicago B. & O. R. Co. v. *Illinois Commerce Comm.*, 82 F. Supp. 368 (D. C. Ill. 1949);

Atlantic Coast Line R. Co. v. *Public Service Comm. of South Carolina*, 77 F. Supp. 675 (D.C. S. C. 1948).

[3] *Prendergast et al.* v. *New York Telephone Co., supra*, note 2.

Atlantic Coast Line R. Co. v. *Public Service Comm. of South Carolina, supra*, note 2.

the jurisdiction of this court in a plenary suit. We hold that, after the judicial stage is reached, a complainant alleging an order of a State commission to be confiscatory in violation of the Fourteenth Amendment may seek the protection of a Federal court even though the State law affords like procedure in the State courts.[4]

Conceding *arguendo* its jurisdiction, defendants urge this court to abstain from its exercise both under the principle of comity between Federal and State courts and under the doctrine of discretionary abstention. But "rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co.* v. *Russell, supra,* 261 U. S. 290, 293. Since no suit is pending at this time in any of the courts of the State of Alabama between the parties to, or involving the subject matter of, this litigation, we hold that rules of comity are inapplicable. *Southern Railway Co.* v. *Alabama Public Service Comm.*, 88 Supp. 441 (1950).

There is ample authority to the effect that if questions of novel, ambiguous or undecided State law are involved in a pending action and it appears that a State court adjudication would decide or render unnecessary the decision of Federal questions, the Federal court should retain jurisdiction but withhold its decision pending determination of

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[4] *Railroad Warehouse Comm. of Minnesota* v. *Duluth Street Ry. Co.*, 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807 (1927);

Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196, 44 S. Ct. 553, 68 L. Ed. 795 (1924);

Prendergast v. *New York Telephone Co., supra*, note 2.

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659 (1923);

Detroit & Mackinac R. R. Co. v. *Michigan R. R. Comm.*, 235 U. S. 402, 35 S. Ct. 126, 59 L. Ed. 288 (1914);

Bacon v. *Rutland Railroad Co., supra*, note 2.

Reagan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894);

Central Kentucky Natural Gas v. *Railroad Comm. of Ky.*, 37 F. 2d 938 (1930);

Union Light, Heat & Power Co. v. *Railroad Comm.*, 17 F. 2d 143 (1926);

Van Wert Gaslight Co. v. *Pub. Utilities Comm. of Ohio*, 299 Fed. 670 (1924).

the matter by the State court with reasonable promptness.[5] We agree that the district court should stay its hand where the Federal question may not survive the decision of the State court as to the local law. But defendants cite no ambiguous, novel or undecided State law involved herein. The authority of the Commission to issue the order is not questioned. The statute under which it acted is not attacked. The Alabama law requires no definitive construction of authoritative interpretation. *Alabama Public Service Commission* v. *Atlantic Coast Line R. Co., supra.* We hold that the doctrine of discretionary abstention does not apply.

III. Maintaining that the allegations of the complaint afford no basis for injunctive relief in any event, defendants advert to the negative form of the Commission's order and assert that the effect of an injunction would be to interfere with the enforcement of State criminal statutes contrary to time-honored principles of equity.

It is conceded that the order is negative in form,[6] but its legal effect could hardly be more positive. Viewed against the statutory scheme adopted by the State to regulate transportation companies, such order is conclusive evidence that plaintiff has done all it could under the State law to get relief and could not get it. To save itself from irreparable

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[5] *Shipman* v. *Dupre,* — U. S. —, — S. Ct. —, 94 L. Ed. 537 (1950); *Railroad Comm. of Texas* v. *Pullman Co.,* 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941); *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943); *Stainback* v. *Mo Hock Me Lok Po.,* 336 U. S. 368, 69 S. Ct. 606, 93 L. Ed. — (1949); *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 163, — S. Ct. —, — L. Ed. — (1942); *A. F. L.* v. *Watson,* 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946); *Township of Hillsborough* v. *Cromwell,* 326 U. S. 620, 66 S. Ct. 53, 90 L. Ed. 415 (1945).

[6] The report and order of the Commission, after a statement of the case and a finding adverse to the railroad concludes: "Premises considered, IT IS ORDERED BY THE COMMISSION, that the petition of the Southern Railway Company filed on September 13, 1948, requesting authority to discontinue the operation of passenger trains Nos. 7 and 8, between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated in the State of Alabama, be and it is hereby denied."

damage it must violate the State's criminal law and submit to its sanctions if State officers do their duty. This, equity does not require. Stripped of artificiality, the order amounts to a stark command by the State that plaintiff continue to furnish the train services involved or suffer the consequences of their abandonment. In view of the findings of fact and conclusions of law, *infra*,[7] we hold that in its impact on plaintiff's business it is affirmative in nature, having the practical effect of confiscating plaintiff's property in violation of the Fourteenth Amendment, and that it is clearly not within the rule of the cases relied upon by defendants.[8]

Equally tenuous is defendant's contention that the injunction prayed for would restrain enforcement of the criminal laws of Alabama in an unwarranted manner. To impart reality to the protection afforded plaintiff by the Fourteenth Amendment it is essential that this court restrain defendants from seeking to impose the sanctions of fines, penalties and forfeitures provided in Title 48, Code of Alabama, 1940. We are without jurisdiction to grant the relief which the Commission wrongfully withheld, namely, permission for plaintiff to abandon these train services. We are warranted in assuming that should we decline to interfere with the enforcement of the criminal laws of Alabama plaintiff would continue to operate these trains at a serious and growing loss, for while the threat of prosecution may be a goad, it is not the only inducement to law observance. Thus, it is not the threat of a multiplicity of prosecutions, but the finding of irreparable damage to plaintiff's property rights that is real, not fanciful, immediate, not remote, which moves us to grant an injunction. We know of no other manner of affording the relief to which plaintiff is entitled.

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[7] See Finding of Fact Nos. 15-38 and Conclusions of Law Nos. 11-17, *infra*.

[8] *Standard Oil* v. *United States*, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed. 999 (1931);
Piedmont & No. Ry. Co. v. *United States*, 280 U. S. 469, 50 S. Ct. 192, 74 L. Ed. 551 (1930).

Defendants rely heavily upon the following statement in *Beal, County Attorney of Douglas County, Nebraska, et al.* v. *Mo. Pac. R. Co.*, 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577 (1941);

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. In re Sawyer, 124 U. S. 200, 211; Davis & Farnum Mfg. Co. v. Los Angeles, 189, U. S. 207; Hygrade Provisions Co. v. Sherman, 266 U. S. 497, 500. No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. Terrace v. Thompson, 263 U. S. 197, 214; Packard v. Banton, 264 U. S. 140, 143; Tyson v. Banton, 273 U. S. 418, 428; Cline v. Frink Dairy Co., 274 U. S. 445, 452."

But it was also said in the Beal case, *supra:*

> "• • • that in view of the state of the record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived. The reversal will accordingly be with instructions to the district court to dismiss the bill of complaint."

In the case at bar there was no concession or waiver of any claim of irreparable injury resulting from a multiplicity of suits or the deprivation of property without due process of law.

We hold that this case falls within the exception to the general rule and find apposite the following language in *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927):

> "• • • The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings

to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. Fenner v. Boykin, 271 U. S. 240, 143; Packard v. Banton, 264 U. S. 140; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502; Terrace v. Thompson, 263 U. S. 197, 214; Ex Parte Young, 209 U. S. 123; Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218; Dobbins v. Los Angeles, 195 U. S. 223, 236, 241; In re Sawyer, 124 U. S. 200, 209, 211."

Proceeding to the merits of the case, we hold that the plaintiff is entitled to the relief for which it prays and enter the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Southern Railway Company, is a corporation organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points within the State of Alabama on the one hand and points in other states throughout the South on the other hand, and is subject to the jurisdiction of the Alabama Public Service Commission and the Interstate Commerce Commission, respectively.

2. The defendant, Alabama Public Service Commission, consisting of a president and two associate commissioners, in an administrative body created under the laws of the State of Alabama (Title 48, Section 1, Code of Alabama, 1940), and thereby authorized to exercise certain regulatory powers over plaintiff (Title 48, Section 106, Code of Alabama, 1940). The principal office and official domicile of said Commission is located in the City of Montgomery, being within the Northern Division of the Middle judicial district of the State of Alabama. (Title 48, Section 11, Code of Alabama, 1940.) Defendant Persons is President, and

defendants Hitchcock and Owen are Associate Commissioners of said Commission and are citizens of the State of Alabama and residents of the City of Montgomery.

3. The defendant Carmichael is Attorney General for the State of Alabama, and is a citizen of the State of Alabama and resident of the City of Montgomery. Defendant Carmichael, as Attorney General of the State of Alabama, is by the statutes of said state charged with the supervision and control of legal proceedings in behalf of the State of Alabama and is attorney for defendant, Alabama Public Service Commission.

4. This is a suit of a civil nature between citizens of different states and arises under the Fourteenth Amendment to the Constitution of the United States. The matter in controversy, exclusive of interest and cost, exceeds the sum of $3,000.

5. Plaintiff complied with Title 48, Section 35 and Section 106, Code of Alabama, 1940, on the 13th day of September, 1948, by filing with defendant Commission an application for authority to discontinue the operation of two local intrastate passenger trains being operated daily between Tuscumbia, Alabama, and Chattanooga, Tennessee.

6. The defendant Commission set said application down for hearing at Huntsville, Alabama, for June 2, 1949. The hearing was continued by the Commission until August 4, 1949, and again until October 6, 1949, when it was heard by two representatives of the Commission, none of the defendant commissioners being present thereat.

7. On April 3, 1950, the Commission entered its report and order and denied plaintiff's application.

8. Plaintiff seeks a temporary and permanent injunction against the defendants, separately and severally, from proceeding to enforce sanctions provided under the law of the State of Alabama for the failure or refusal of plaintiff to continue the operation of local passenger trains Nos. 7 and 8 within the State of Alabama in violation of order No. 11988, entered by defendant Commission April 3, 1950, and

that said order be declared unlawful, null, void and of no effect.

9. On September 13, 1948, a notice was posted at each affected station in Alabama that plaintiff had petitioned the Alabama Public Service Commission for authority to discontinue local trains Nos. 7 and 8. These notices remained posted for a period of ten days in compliance with the rule of defendant Commission.

10. Local train No. 7 leaves Chattanooga, Tennessee, and makes scheduled or flag stops at the following towns in Alabama: Stevenson, Fackler, Hollywood, Scottsboro, Larkinsville, Limrock, Woodville, Paint Rock, Gurley, Brownsboro, Chase, Huntsville, Madison, Belle Mina, Decatur, Trinity, Hillsboro, Wheeler, Courtland, Town Creek, Leighton, and Sheffield-Tuscumbia. Local Train No. 8 makes the same trip in reverse, starting at Sheffield-Tuscumbia and ending at Chattanooga, Tennessee.

11. Train No. 7 leaves Chattanooga, Tennessee, at 4:15 P. M. and arrives at Sheffield-Tuscumbia, Alabama 9:05 p. m. Train No. 8 leaves Sheffield-Tuscumbia, Alabama, at 5:55 a. m. and arrives at Chattanooga, Tennessee, at 10:50 a. m.

12. In addition to local trains Nos. 7 and 8, plaintiff operates trains Nos. 35 and 36, and trains Nos. 45 and 46 between Chattanooga, Tennessee, and Sheffield-Tuscumbia, Alabama. Train No. 35 leaves Chattanooga, Tennessee, at 7:00 A. M. and arrives at Sheffield-Tuscumbia, Alabama, at 12:20 p. m. Train No. 36 leaves Sheffield-Tuscumbia, Alabama, at 12:40 p. m. and arrives at Chattanooga, Tennessee, at 6:00 p. m. Train No. 45 leaves Chattanooga, Tennessee, at 11:50 p. m. and arrives at Sheffield-Tuscumbia, Alabama, at 4:10 a. m. Train No. 46 leaves Sheffield-Tuscumbia, Alabama, at 11:10 p. m. and arrives at Chattanooga, Tennessee, at 3:10 a. m. Trains Nos. 35 and 36 make a scheduled stop or flag stop at the following towns in Alabama:

Stevenson, Fackler, Hollywood, Scottsboro, Larkinsville, Limrock, Woodville, Paint Rock, Gurley, Brownsboro,

Chase, Huntsville, Madison, Belle Mina, Decatur, Trinity, Hillsboro, Wheeler, Courtland, Town Creek, Leighton to Sheffield-Tuscumbia. Trains Nos. 45 and 46 make a scheduled stop or flag stop at Chattanooga, Tennessee, and the following towns in Alabama. Stevenson, Scottsboro, Huntsville, Decatur and Sheffield-Tuscumbia.

13. Odd number trains 7, 35 and 45 operate westbound from Chattanooga, Tennessee, to Sheffield-Tuscumbia, Alabama. Even number trains 8, 36 and 46 operate eastbound from Sheffield-Tuscumbia, Alabama, to Chattanooga, Tennessee. All six trains are operated daily and carry passengers, mail and express.

14. The passenger coaches used on trains Nos. 7 and 8 are of steel construction, electric lighted, steam heated, equipped with electric fans, flush toilets, window screens, drinking fountains and smoking compartment. The equipment is generally cleaned at Sheffield and Chattanooga, and repaired at Chattanooga.

15. It requires ten men to operate trains Nos. 7 and 8, five men in each direction. Each crew is composed of an engine crew of engineer and fireman and a train crew of conductor, flagman and baggageman. On Saturday and Sunday a porter is employed as an extra member on each train.

16. The few passengers that ride local trains Nos. 7 and 8 make a short-haul from one local town to another of about 5½ to 10 miles distance.

17. If trains Nos. 7 and 8 are discontinued, no station between Chattanooga, Tennessee, and Sheffield-Tuscumbia, Alabama, would be closed for that reason.

18. Statistical information concerning the operation of trains Nos. 7 and 8 for the twelve months ending February 29, 1948, shows that "actual" direct expenses ($87,524.05) very nearly approximate total gross revenue earned ($98,842.92). With "apportioned" direct expenses added, the twelve-months' operation resulted in an excess of direct expenses over total revenue of $78,710.74. Stated differ-

ently, the railway spends $1.80 to earn $1.00 of gross revenue.[9]

19. For the twelve-month period ending February 28, 1949, "actual" direct expenses ($90,993.77) exceeded total gross revenue ($79,956.27). With "apportioned" direct expenses added, direct expenses exceed total revenue by $102,326.93. Stated differently, the Railway paid out $2.28 to earn $1.00 of gross revenue.

20. For the five-month period ending July 31, 1949, "actual" direct expenses ($40,819.57) exceeded total gross revenue ($30,745.28). With "apportioned" direct expenses added, direct expenses exceeded total revenue by $53,692.56. The plaintiff railroad paid out $2.75 to earn $1.00 of gross revenue.

21. The average number of passengers on trains Nos. 7 and 8 per train mile decreased from 26.63 for the twelve months ending February 29, 1948, to 18.13 for the twelve months ending February 28, 1949, and to 13.92 for the five months ending July 31, 1949. The average number of passengers per train mile on all other Southern Railway passenger trains was 84.65 for the twelve months ending February 29, 1948, 76.30 for the twelve months ending February 28, 1949, and 67.93 for the five months ending July 31, 1949.

22. The average revenue from passengers per train mile for trains Nos. 7 and 8 decreased from 54.90 cents for the twelve months ending February 29, 1948, to 37.35 cents for the twelve months ending February 28, 1949, and to 29.22 cents for the five months ending July 31, 1949; this contrasts with all other Southern Railway passenger trains,

[9] In these and the following computation the term "actual" direct expenses includes the wages for the train and engine crews, payroll tax, railroad retirement and unemployment insurance, train fuel and damage to livestock on the right of way. The term "apportioned" direct expenses includes engine house expenses, water, lubricants, supplies and repairs for passenger locomotives and train cars, costs of trackage over N. C. & S. L., and the Chattanooga station company expenses. Nothing was included for maintenance of way, track and structures, station, yard, all traffic expenses, general supervision, taxes except payroll, fixed charges, depreciation or return on investment.

with an average of 192.81 cents for the twelve months ending February 29, 1948, 195.92 cents for the twelve months ending February 28, 1949, and 183.67 cents for the five months ending July 31, 1949.

23. Plaintiff's operation of its entire passenger business for the period 1931-1941, inclusive, resulted in a net operating deficit of $55,262,779. For the period 1942-1945, inclusive, passenger operations produced a net operating income of $44,938,879. For the post-war years, 1946-1948, inclusive, passenger operations resulted in a net operating deficit of $20,796,189. However, for the same respective periods, plaintiff's net freight service operating income was as follows: for the years 1931-1941, inclusive, $233,815,273; for the years 1942-1945, inclusive, $97,305,303; for the years 1946-1948, inclusive, $90,631,088. By combining the results of passenger and freight service, it appears that plaintiff's net operating income was as follows: for the years 1931-1941, inclusive, $178,552,494; for the years 1942-1945, inclusive, $142,244,182; and for the years 1946-1948, inclusive, $69,834,899.

24. For each year 1936-1941, inclusive, plaintiff's operation of passenger service within the State of Alabama resulted in a net operating deficit, the total for such period having been $3,962,525. For each year 1942-1945, inclusive, there was a net operating income, the total for such period having been $2,946,758. For each year 1946-1948, inclusive, there was a net operating deficit, the total for such period having been $2,872,505. The plaintiff's operation of freight service within the State of Alabama resulted in the following: for the years 1936-1941, inclusive, a net operating income of $13,012,218; for the years 1942-1945, inclusive, a net operating income of $13,934,056; and, for the years 1946-1948, inclusive, a net operating income of $10,667,882. Taking these two sets of figures together, the plaintiff's operation within the State of Alabama resulted in a net railway operating income from both passenger and freight service for the years 1936-1941, inclusive, of $9,049,693; for the years 1942-1945, inclusive, of $16,880,814, and for the years 1946-1948, inclusive, of $7,795,377.

25. Comparing 1948 with 1936, plaintiff's average receipts per passenger mile throughout its entire system increased 47%, whereas the average annual compensation per employee increased 109%, materials and supplies 134% and payroll taxes 1,344%.

26. For the Southern Railway Company as a whole, the average yearly gross revenue from passengers was: for the years 1921-1930, inclusive, $27,956,720; for the years 1931-1941, inclusive, $9,573,645; for the years 1942-1945, inclusive, $52,639,553; and for the years 1946-1948, inclusive, $25,195,733.

27. A comparison of the distribution of inter-city passenger traffic in the United States for the years 1926 and 1948 shows that in 1926 the steam roads handled 21.9%, in 1948 only 11.4%, a decrease of 48%. Private automobiles in 1926 transported 70.9%; in 1948, 79.7%, an increase of 12%. Busses transported 2.7% in 1926 and 6.6% in 1948, an increase of 144%.

28. For the year ending February 29, 1948, the daily average revenue from passengers on trains Nos. 7 and 8 was $180.94, whereas the daily average total of wages, payroll tax and fuel was $238.04. For the year ending February 28, 1949, the daily average revenue from passengers on trains Nos. 7 and 8 was $124.74, whereas the daily average total of wages, payroll tax and fuel was $276.19. For the five-month period, March 1, through July 31, 1949, the daily average revenue from passengers on trains Nos. 7 and 8 was $97.02, whereas the daily average total of wages, payroll tax and fuel was $265.26. For the eight-month period, August 1, 1949, through March 31, 1950, the daily average revenue from passengers on trains Nos. 7 and 8 was $83.11, whereas the daily average total of wages, payroll tax and fuel was $278.57.

29. Prior to 1946, plaintiff operated a diesel-electric power unit, the "Joe Wheeler," on the run now served by trains Nos. 7 and 8, but after several years of experimentation, discontinued its operation because of the uneconomical results which obtained.

30. Plaintiff is not a common carrier of the United States mail. The collection and delivery of all mail is the function of the United States Government, exclusively.

31. The line of railroad traversed by trains Nos. 7 and 8 from Bridgeport, Alabama, to Sheffield-Tuscumbia, Alabama, is closely paralleled by hard surface highways and many of the communities along the railroad are located directly on important east-west highways. Several of the larger communities are also located on important north-south highways. The Lee Highway (U. S. No. 72) closely parallels the line of railroad from the Alabama-Tennessee state line to Huntsville, from which point the railroad runs southwesterly to Decatur, and then generally westerly to Tuscumbia. From Huntsville to Tuscumbia the line of railroad is closely paralled by the Joe Wheeler Highway (Ala. No. 20).

32. The American Bus Lines operate thirteen round trips daily between Florence and Huntsville. Seven of these schedules operate easterly over State Highway No. 20 between Tuscumbia and Huntsville, while six schedules operate westerly from Huntsville to Tuscumbia, via State Highway No. 20. The remaining schedules, east and west, operate over U. S. Highway No. 72 via Athens. Some of these busses operate in through service between Memphis and Charlotte and Memphis and Asheville. Eight round trips are operated daily between Florence and Chattanooga. Not less than seventy busses arrive in or depart from Huntsville daily. Decatur is also served by the Southeastern Greyhound Lines, operating nine round trips daily between Nashville and Birmingham.

33. The steps, in timetable order, populations and bus service available for each of the towns traversed by trains Nos. 7 and 8 between Stevenson and Sheffield-Tuscumbia are as follows:

(a) Bridgeport, an agency station (NC&StL) in an incorporated community with a population according to the 1940 federal census of 2031 (2124 in 1930):

Located on U. S. Highway No. 72.

Six busses daily between Florence and Chattanooga and seven busses daily between Chattanooga and Florence plus an additional round trip daily between Scottsboro and Chattanooga via American Bus Lines.

Also served by daily trains of the NC&StL and other daily trains of Southern Railway Company.

(b) Stevenson, an agency station in an incorporated community with a population according to the 1940 federal census of 793 (733 in 1930):

Located on U. S. Highway No. 72.

Six busses between Florence and Chattanooga and seven busses daily between Chattanooga and Florence plus an additional round trip daily between Scottsboro and Chattanooga via American Bus Lines.

Also served by daily trains of the NC&StL and other daily trains of the Southern Railway Co.

(c) Fackler, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on gravel road about two miles from U. S. Highway No. 72.

Also served by other daily trains of Southern Railway.

Bus service along U. S. Highway No. 72.

(d) Hollywood, an agency station in an incorporated community with a population according to the 1940 federal census of 311 (274 in 1930):

Located on gravel road about one mile from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72.

Also served by other daily trains of Southern Railway.

(e) Scottsboro, an agency station in an incorporated community with a population according to the 1940 federal census of 2834 (2304 in 1930):

Located at junction of U. S. Highway No. 72 and State Primary Highways Nos. 32 and 35.

Eight busses daily in each direction between Florence and Huntsville and Chattanooga via American Bus Lines.

One bus daily in each direction between Scottsboro and Chattanoogo via American Bus Lines.

Two round trips daily between Scottsboro and Flat Rock via Northeast Alabama Bus Co., Inc.

Four round trips daily between Ft. Payne and Guntersville via Northeast Alabama Bus Co., Inc.

Also served by other daily trains of Southern Railway Co.

(f) Larkinsville, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by other daily trains of Southern Railway Co.

(g) Limrock, a non-agency station in an unincorporated community with an estimated population of 50 within sight of the stopping place:

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by other daily trains of Southern Railway Co.

(h) Woodville, an agency station in an incorporated community with a population according to the 1940 federal census of 183 (196 in 1930):

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also flag stop for Southern Railway daily trains 35 and 36.

(i) Paint Rock, an agency station in an incorporated community with a population according to the 1940 federal census of 282 (320 in 1930):

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(j) Gurley, an agency station in an unincorporated community with an estimated population of 500 within sight of the station:

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(k) Brownsboro, an agency station in an unincorporated community with an estimated population of 75 within sight of the stopping place:

Located on hard surface road about six-tenths of a mile from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72.

Also flag stop for daily Southern Railway trains 35 and 36.

(l) Chase, a joint agency station (with NC&StL) in an unincorporated community with an estimated population of 50 within sight of the stopping place:

Flag stop for train No. 7 and regular stop for train No. 8

Located on hard surface road about two miles from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72 (Chase Road) between Florence and Chattanooga. Also bus service along unnumbered road between Huntsville and Shelbysville, Tenn. via Cherokee Motor Coach Lines.

Also served by daily except Sunday, mixed trains of the NC&StL, operating between Decherd, Tenn. and Huntsville, about 48 miles.

Also flag stop for daily Southern Railway trains 35 and 36.

(m) Huntsville, an agency station in an incorporated community with a population according to the 1940 federal census of 13,050 (11,554 in 1930):

Located at junction of U. S. Highways Nos. 24, 72 and 241 and State Primary Highway No. 20.

Eight busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Thirteen busses daily in each direction between Florence and Huntsville (seven via Tuscumbia eastbound and six via Tuscumbia westbound—the remaining schedules via Athens) via American Bus Lines.

Five busses daily in each direction from and to New Market (four each way from and to Winchester, Tenn.) via Cherokee Motor Coach Lines.

Nine busses daily to and from Nashville, Tenn. via Crescent Stages, Inc.

Eight busses daily to and from Montgomery, Ala., via Crescent Stages Inc.

Eleven busses daily to and from Anniston, Alabama, via Crescent Stages, Inc.

Nine busses daily to and from Sylacauga, Ala. (with connections to and from Birmingham) via Crescent Stages, Inc.

Also served by other daily trains of Southern Railway Co.

Also served by daily, except Sunday, mixed trains of NC&StL between Decherd, Tenn. and Huntsville, about 48 miles.

(n) Madison, an agency station in an incorporated community with a population according to the 1940 federal census of 455 (431 in 1930):

Located on State Highway No. 20.

Seven busses daily between Florence-Decatur and Huntsville and six busses daily between Huntsville-Decatur and Florence via America Bus Lines.

Connection at Huntsville from and to Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

(o) Belle Mina, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on State Highway No. 20.

Seven busses daily between Florence-Tuscumbia and Huntsville via Decatur and six busses daily between Huntsville and Tuscumbia-Florence via Decatur via American Bus Lines.

Also flag stop for daily Southern Railway trains 35 and 36.

(p) Decatur, an agency station in an incorporated community with a population according to the 1940 federal census of 16,604 (15,593 in 1930):

Located at junction of U. S. Highway No. 31 and State Highways Nos. 20 and 24.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville-Tuscumbia and Florence via American Bus Lines. Connections at Huntsville from and to Chattanooga.

Three busses daily in each direction to and from Red Bay, Ala., via Red Bay Bus Lines.

Four busses daily in each direction from and to Moulton, Ala., via Red Bay Bus Lines.

Nine busses daily in each direction between Birmingham and Nashville via Southeastern Greyhound Lines.

Also served by other daily Southern Railway trains in addition to daily L&N trains between Cincinnati-Birmingham and beyond.

(q) Trinity, a non-agency stop in an incorporated community with a population according to the 1940 federal census of 249 (208 in 1930):

Located on hard surface road about one mile from State Highway No. 20.

Bus service along State Highway No. 20 between Folrence and Huntsville with connections at Huntsville to and from Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(r) Hillsboro, an agency station in an incorporated community with a population according to the 1940 federal census of 292 (240 in 1930):

Located on hard surface road about one mile from State Highway No. 20.

Bus service along State Highway No. 20 between Florence and Huntsville with connection at Huntsville from and to Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(s) Wheeler, a non-agency station with an estimated population of 100 within sight of the station:

Located on State Highway No. 20.

Seven busses daily between Florence and Huntsville and six busses daily between Huntsville and Florence via American Bus Lines with connections at Huntsville from and to Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(t) Courtland, an agency station in an incorporated community with a population according to the 1940 federal census of 454 (359 in 1930):

Located on State Highway No. 20 near junction with State Highway No. 36, the latter highway connecting State Highways Nos. 20 and 24.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville-Tuscumbia and Florence via American Bus Lines with connections at Huntsville to and from Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

(u) Town Creek, an agency station in an incorporated community with a population according to the 1940 federal census of 637 (427 in 1930):

Located at junction of State Highway No. 20 and State Highway No. 101, the latter highway connecting State Highway No. 20 and U. S. Highway No. 72.

Seven busses daily between Florence and Huntsville and six busses daily between Huntsville and Florence via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(v) Leighton, an agency station in an incorporated community with a population according to the 1940 federal census of 810 (670 in 1930):

Located on State Highway No. 20.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville and Tuscumbia-Florence via American Bus Lines with connections at Huntsville to and from Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

34. The motor vehicle registration in the State of Alabama for the year 1948 shows 391,704 automobiles, 3,859 busses and 137,511 trucks.

35. The number of inhabitants per registered automobile in the counties of Alabama through which trains Nos. 7 and

8 run are as follows: Colbert, 6.2; Lawrence, 11; Limestone, 8.8; Morgan, 7.5; Madison, 7.4; Jackson, 12.9; and, for the State of Alabama, the number of inhabitants per registered automobile is 7.8.

36. There is adequate highway motor freight service along the route traversed by trains Nos. 7 and 8, and each city or town is serviced by one or more of the following interstate highway motor freight carriers:

Baggett Transportation Co.
Birmingham-Huntsville Transport, Inc.
Fayetteville Transfer Co.
Loo-Mac Freight Lines.
Malone Freight Lines, Inc.
Martin Motor Express.
Neely-Ross Motor Express, Inc.
North Alabama Motor Express, Inc.
Roadway Express, Inc.
Silver Fleet Motor Express, The.
Valley Truck Lines, Inc.
Mohawk Motor Lines, Inc.
Dixie-Ohio Express Co.
Gordon's Transports, Inc.
Hoover Motor Express Co., Inc.
McCullough & Sanderson.
Inter-City Trucking Co.
Meeks Motor Freight.

37. The passenger transportation revolution, resulting from the construction of a vast network of highways, improvement of the private automobile, and the availability of bus service, has transferred passenger transportation needs from the railroad to the highway.

38. The convenience of the private automobile and busses has outmoded local passenger trains Nos. 7 and 8 and caused them to become an undesirable form of transportation.

Conclusions of Law

1. Plaintiff's suit arises under the Fourteenth Amendment to the United States Constitution and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

2. This court has jurisdiction of the parties and of the subject matter.

3. The questions for decision present no unresolved question of State law.

4. Under the provisions of Title 48, Sections 35 and 106, Code of Alabama, 1940, plaintiff is required to obtain a permit from Alabama Public Service Commission before discontinuing regularly scheduled passenger trains.

5. Defendants Persons, Hitchcock, and Owen, as the President and Associate Commissioners of the Alabama Public Service Commission, are charged with the duty of regulating and controlling transportation companies (Title 48, Section 104, et seq., Code of Alabama, 1940).

6. Defendant Carmichael, as Attorney General of the State of Alabama, is charged with the duty of enforcing all orders of the Alabama Public Service Commission and the sanctions provided in Title 48, Code of Alabama, 1940.

7. The Alabama Public Service Commission is charged with the duty of supervising, regulating and controlling all transportation companies doing business in the State in specified particulars, including the maintenance of such public service as may be reasonable and just. Title 48, Section 104, Code of Alabama, 1940.

8. In Alabama the duty to maintain such public service as may be reasonable and just is not imperative but is relative. "In order to justify a reduction of the service, the carrier is not required to show that the rate of return on the system requires the reduction, or that it would impede interstate commerce, but it is sufficient if the reduced plan would supply such train service as the public necessities demand and require (cases cited)." *Ala. Pub. Serv.*

Comm. v. *Atlantic Coust Line R. Co.*, — Ala. —, 45 So. 2d 449 (1950).

9. Plaintiff is under no obligation to continue to offer a service which the public will not use, where the offer is a financial burden, and where it is unreasonable to demand its continuance.

Thompson v. *Boston & Maine R.R.*, 86 N. H. 204, 166, A.249;

Atlantic Coast Line R. R. v. *Public Service Comm. of So. Carolina, supra;*

Alabama Public Service Comm. v. *Atlantic Coast Line R. Co., supra.*

10. The controlling criteria in determining whether local passenger trains may be discontinued are these: the character and population of the territory served, the public patronage, or lack of it, the facilities remaining, the expense of operation as compared with revenue from same, and the operations of the carrier as a whole,

Atlantic Coast Line R.R. v. *Public Service Comm. of So. Carolina, supra;*

Ala. Pub. Serv. Comm. v. *Atlantic Coast Line R.R., supra.*

11. If plaintiff continues to operate local trains Nos. 7 and 8, it will suffer irreparable damage by expending sums grossly disproportionate to revenue in a situation where there is no public necessity or demand for such service.

12. If plaintiff fails to operate local trains Nos. 7 and 8, plaintiff will be subjected to irreparable loss by incurring liability under sanctions imposed by Title 48, Code of Alabama, 1940, including Sections 110, 399, 400 and 405.

13. Plaintiff has no adequate remedy at law.

14. Plaintiff will suffer irreparable damage unless this court permanently enjoins defendants and their successors in office from seeking to impose the sanctions provided by Title 48, Code of Alabama, 1940, upon discontinuance by plaintiff of operation of its passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee,

in opposition to the order of the defendant Commission, Docket No. 11988, April 3, 1950.

15. Order No. 11988, of April 3, 1950, rendered by the defendant Commission denying plaintiff permission to discontinue local trains Nos. 7 and 8 is unjust, unreasonable and confiscatory and deprives plaintiff of its property without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States since there is no longer public necessity for this service and plaintiff is operating at a large financial loss.

16. Plaintiff owes no common carrier obligation, either to the United States or to the General Public to transport the United States Mail.

17. Plaintiff is entitled to a permanent injunction enjoining defendants Alabama Public Service Commission, Gordon Parsons, its President, Jimmy Hitchcock and C. C. Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, together with the successors in office of each of them, and their agents, servants and attorneys from pursuing any of the remedies of mandamus, injunction, fine, forfeiture or penalty provided in Title 48, Sections 110, 399, 400 and 405, Code of Alabama, 1940, or otherwise, for the purpose of compelling plaintiff to continue to operate local trains Nos. 7 and 8 between Sheffield-Tuscumbia, Alabama, and Chattanooga, Tennessee, pursuant to Title 48, Sections 35 and 106, Code of Alabama, 1940, and the order of the Alabama Public Service Commission, Docket No. 11988, of April 3, 1950.

Done at Montgomery, Alabama, this the 20 day of July, 1950.

LEON MCCORD,
United States Circuit Judge.
C. B. KENNAMER,
United States District Judge.
SEYBOURN H. LYNNE,
United States District Judge.

Filed July 20, 1950. O. D. Street, Jr., Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 681

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, *Defendants*

This cause coming on to be heard before a duly constituted three-judge district court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant, Alabama Public Service Commission, held at Huntsville, Alabama, on October 6, 1949, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein:

It is now Ordered, Adjudged and Decreed this 20th day of July, 1950, as follows, viz:

(1) That the motion of the defendants to dismiss and the several motions of the defendants to stay proceedings in this cause be and the same are hereby denied;

(2) That the order of the defendant, Alabama Public Service Commission, dated April 3, 1950, denying the petition of plaintiff filed September 13, 1948, requesting authority to discontinue the operation of passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated in the State of Alabama, be and the same is hereby vacated and declared to be null, void and of no effect;

(3) That the defendants, Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Ala-

bama, together with the successors in office of each of them, and their agents, servants and attorneys, be and they are hereby permanently enjoined from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama, 1940, or any remedies against the plaintiff, its officers, agents or employees on account of the failure to observe the provisions and requirements of said order by abandoning and discontinuing the operation of plaintiff's passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated within the State of Alabama; and,

(4) That the costs of court incurred in this cause be and the same are hereby taxed against the defendants, for which execution may issue.

LEON MCCORD,
United States Circuit Judge.
C. B. KENNAMER,
United States District Judge.
SEYBOURN H. LYNNE,
United States District Judge.

Filed July 20, 1950. O. D. Street, Jr., Clerk.

Appendix "B"

Alabama Statutes

Code of Alabama 1940, Title 48:

Sec. 35. Abandonment of service, regulated:—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate.

Sec. 50. Attorney General to represent commission; special counsel provided for:—The attorney shall represent the public service commission in any and all legal proceedings which it may have the power to institute and which, pursuant to such power, it has instituted, and in all legal proceedings against it, and shall institute such legal proceedings which the commission may request or deem necessary, provided it has the power to institute them, to enforce the provisions of this title or compel obedience to and observance of the same by any person, firm, company, or corporation, upon which such obedience or observance is imposed. The attorney general with the approval of the governor may employ any special counsel to institute or defend such legal proceedings or to assist the attorney general therein, and to contract with the special counsel concerning a reasonable compensation for his or their services, which compensation shall be paid out of the treasury on a warrant drawn by the comptroller on the treasury upon approval by the governor. (1907, p. 43).

Sec. 76. Rehearings.—Any time after an order has been made by the commission, any person interested therein may apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such re-

hearing within sixty days after the said application therefor has been filed, and such rehearing shall be subject to such rules as the commission may prescribe. Application for such rehearing shall not excuse any utility or person from complying with or obeying an order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order, but shall not affect any right, or the enforcement of any right, arising from or by virtue of compliance with the original order prior to the order made after rehearing.

Sec. 78. Courts may compel compliance with orders of commission and punish failure.—In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

Sec. 79. Appeals from orders of commission.—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the Circuit Court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when

the appellant is the State of Alabama. (1909, p. 96; 1932, Ex. Sess., p. 233.)

Sec. 81. Right to supersede order.—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

Sec. 82. Proceedings on appeal.—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon findings of facts contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings. (1932, Ex. Sess., p. 233.)

Sec. 84. Appeal does not supersede order:—supersedeas bond.—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares, charges, or any of them, or any schedule, or part or parts, of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas

that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided.

Section 106. Permit to abandon service.—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

Sec. 399. Penalty for charging excessive rates, granting rebates, or violating commission's order, etc.—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense. (Ib.; 1932, Ex. Sess., p. 209.)

Section 400. Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.—Every officer, agent or employee of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discrimi-

nations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court. (1907, p. 23.)

United States Statutes.

United States Code, Title 28:

Sec. 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or pro-

ceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. As amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104.

Sec. 2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Sec. 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the state.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or ageney of the United States, at least five days' notice of the hearing shall be given the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial,

and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary of final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.